STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY TERRELL BYRD,

Defendant-Appellant.

UNPUBLISHED
April 20, 2001

No. 223713
Muskegon Circuit Court
LC No. 99-043569-FH

Before: Hoekstra, P.J., and Whitbeck and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11; MSA 28.1083, to a term of nine to twenty-five years' imprisonment for the assault with intent to rob while armed conviction, to be preceded by the mandatory two-year sentence for his felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the evidence at trial was insufficient to support his conviction of assault with intent to rob while armed. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998). This Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses, and must resolve all conflicts in the evidence in favor of the prosecution. *Wolfe*, *supra* at 515; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of assault with intent to rob while armed are an assault with force and violence, coupled with an intent to rob or steal while armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). Intent can be inferred from the facts and circumstances. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998); see also *Wolfe*, *supra* at 524; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

In challenging the sufficiency of evidence, defendant argues that the prosecutor failed to produce evidence sufficient to establish that he possessed the requisite intent to rob. The record reveals that defendant entered complainant's truck, produced a small-caliber handgun, and demanded that complainant drive. The complainant testified that as he drove, defendant, while still holding the gun, stated that he wanted $5. After learning that complainant had no money, defendant ordered complainant to pull into an alley and when complainant refused, defendant threatened to "cap" him. When complainant stopped the truck pursuant to defendant's request, complainant jumped out, ran a short distance from the truck, and demanded that defendant get out of the truck. Defendant eventually left the truck after rummaging through the glove box. Further, another witness testified that less than two hours after the incident with complainant, defendant similarly entered his vehicle uninvited, demanded a ride, and when the witness refused, stole several items from the car before fleeing.[1] Viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found the requisite intent was proven beyond a reasonable doubt. *Wolfe, supra*; *Godbold, supra*.

Defendant next argues that the trial court abused its discretion in admitting testimony regarding similar acts. Again, we disagree. We review a trial court's admission of similar acts evidence for abuse of discretion. *People v Williams*, 240 Mich App 316, 322; 614 NW2d 647 (2000).

Under MRE 404(b), other acts evidence is admissible if it is offered for a proper purpose, it is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). A proper purpose is one other than to establish the defendant's character in order to show his propensity to commit the charged offense. *Id.*

Here, the prosecutor offered testimony of the second incidence to establish a common plan, scheme, or system in doing an act, and to demonstrate defendant's intent at the time he entered complainant's truck. In objecting to admission of this evidence, counsel for defendant argued that because no gun was involved in the second incident, the facts of that occurrence were not sufficiently similar to those of the charged crime so as to establish a plan or scheme and warrant admission under MRE 404(b). Despite defendant's argument in this regard, the trial court deemed the testimony regarding the second incident admissible to refute defendant's claim that he got into complainant's truck as part of an agreed-upon plan to aid complainant in obtaining drugs.

In *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000), our Supreme Court stated that so long as the similarities between the charged and uncharged conduct are "sufficiently similar" from which to infer the existence of a common plan, scheme, or system, other acts evidence can be used to show that a defendant used a systematic plan in carrying out the charged offense. *Id*. at 63. In doing so, however, the Court noted that the level of similarity required of such acts when disproving an innocent intent, is less than that necessary when

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[1] While defendant challenges the trial court's decision to admit this witness' testimony, we believe, as discussed *infra*, that the testimony was properly admitted under MRE 404(b).

attempting to use modus operandi solely to infer the existence of a common plan, scheme, or system:

> The clue to the difference is best gained by remembering that in the one class of cases the act charged is assumed as done, and the mind asks only for something that will negative innocent intent; and the mere prior occurrence of an act similar in its gross features – i.e., the same doer, and the same sort of act, but not necessarily the same mode of acting nor the same sufferer – may suffice for that purpose. But where the very act is the object of proof, and is desired to be inferred from a plan or system, the combination of common features that will suggest a common plan as their explanation involves so much higher a grade of similarity as to constitute a substantially new and distinct test. [*Id*. at 65, quoting 2 Wigmore (Chadbourn rev), Evidence, § 304, pp 250-251.]

See also *VanderVliet*, *supra* at 80 n 36 ("The level of similarity required when disproving innocent intent is less than when proving modus operandi.").

In the present case, it was not disputed that defendant entered complainant's truck and, for a short period of time, drove along the streets as a passenger within that truck. Thus, it was not the act itself that was the "object of proof," but rather defendant's purpose and intent in doing that act. In such cases, "logical relevance dictates only that the charged crime and the proffered other acts 'are of the same general category.'" *VanderVliet*, *supra* at 79-80, quoting Imwinkelried, Uncharged Misconduct Evidence, § 3:11, p 23. Here, given the purpose for which the testimony about the second incident was offered, we believe that the similarities between the two occurrences were sufficient to warrant its admission. Both the charged and uncharged conduct occurred within the same general vicinity and involved defendant's entering uninvited the vehicle of a lone driver and then making demands for a ride. Although the later occurrence did not involve the use of a weapon, property was nonetheless taken from the driver during the incident; a fact which comports with the prosecutor's stated purpose for offering the other acts testimony, i.e., to establish a common plan or scheme and to demonstrate an intent to rob. Accordingly, we do not believe that defendant's assertion that his conduct toward the driver in the second incident was not sufficiently similar to that with which defendant was charged is sufficient ground to conclude that the trial court erred in admitting Richardson's testimony.

Nor do we believe that, as argued by defendant, this evidence should have been precluded because the danger of undue prejudice inherent in the testimony substantially outweighed its probative value. Although the potential for prejudice existed, the evidence was highly probative in showing a system that defendant used to extract money and other valuables from lone drivers, and consequently, in rebutting defendant's claim that he entered complainant's truck not to rob him, but as part of an agreed-upon plan to aid complainant in obtaining drugs. Moreover, inasmuch as the trial court limited the jury's use of this evidence through instructions given both before the driver in the second incident testified and again at the conclusion of proofs, any potential for prejudice that did exist was sufficiently tempered. See *People v Starr*, 457 Mich 490, 503; 577 NW2d 673 (1998). Accordingly, we find no error in the trial court's admission of the challenged evidence.

Finally, defendant contends that the trial court abused its discretion in sentencing him to a term of nine to twenty-five years' imprisonment for his conviction of assault with intent to rob while armed, arguing that in imposing this sentence the trial court failed to consider his potential for rehabilitation, as well as his mental disabilities. Defendant asserts that the sentence imposed should be reduced because it does not reflect the principle that a sentence should be proportionate to the offense and the offender. However, we are without authority to render the requested relief.

Because the crimes for which defendant was convicted occurred after January 1, 1999, he was sentenced under the newly enacted statutory guidelines.[2] See MCL 769.34; MSA 28.1097(3.4). Defendant's minimum sentence of nine years (108 months) falls within the guidelines' recommended range of 81 to 202 months. Where, as here, a sentence falls within the guidelines range delineated by the Legislature, this Court's review is specifically curtailed:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals *shall affirm* that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. [MCL 769.34(10); MSA 28.1097(3.4)(10) (emphasis added).]

In *People v Babcock*, 244 Mich App 64; ___ NW2d ___ (2000), this Court found that the clear import of this language precludes appellate review of the proportionality of sentences that fall within the guidelines range:

> The clear language of [MCL 769.34(10); MSA 28.1097(3.4)(10)] compels the conclusion that the Legislature intended to preclude any appellate scrutiny of sentences falling within the appropriate guidelines range absent scoring errors or reliance on inaccurate information. This conclusion is supported by the mandatory language requiring that this Court "shall affirm" sentences inside the guidelines, *People v Kelly*, 186 Mich App 524, 529; 465 NW2d 569 (1990), and by another provision in the same statute, which requires trial courts to advise a defendant that the defendant may appeal *only* when the sentence "is longer or more severe than the appropriate sentence range. MCL 769.34(7); MSA 28.1097(3.4)(7)" [*Babcock*, *supra* at 73.]

Therefore, inasmuch as defendant does not assert an inaccuracy in the information used to determine his sentence or otherwise challenge the guidelines scoring, this Court must affirm his sentence on appeal.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Jessica R. Cooper

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[2] The applicable legislative guidelines include a set of prior record variables. MCL 777.50 *et seq.*; MSA 28.1274(60) *et seq.*